

NSE V/s MoneyLife: Bombay HC Slams NSE For 'Arrogance', Appreciates Media's 'Watchdog' Role



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Introduction:

An application for injunction in a defamation action was filed by National Stock Exchange ('NSE') against online news and analysis journal / website – www.moneylife.in and its Managing Editor and Executive Editor. The defamation action related to an article published in the journal / website, wherein it accused the NSE of actively permitting illicit trading and the advantages being afforded to a select few using high-end technology. The article published by Moneylife alleged illegality and criminality in the actions of the NSE, wherein it accused NSE of being 'like a fortress' and unwilling to part with any information or to provide any clarification.

Chronology of events:

1. **January 14, 2015:** An anonymous letter was sent to SEBI (Deputy General Manager of the Market Regulation Department), with a copy to one of the Editors of journal / website. The letter was quite 'technical' and gave details relating to illegality or impropriety in 'high-frequency trades' ('HFT') or algorithmic trades ('algo trades') facilitated by NSE's allowing co-location of its servers;
2. **June 19, 2015:** Articles was published several months in the journal / website, for which NSE sued for defamation;
3. **July 8, 2015:** another article was published, which according to NSE tend to lead 'the lay reader' that because of the articles that regulators (like, RBI & SEBI) have commenced investigations, there are serious wrongdoings on NSE's part and NSE itself is complicit in permitting these illegal HFTs or algo trades;
4. **July 22, 2015:** As per the statement of NSE, it filed a defamation suit against the journal / website and its Editors who published unsubstantiated and misleading reports against it. NSE sought withdrawal of the reports (relating to algo-trading mechanism etc) and claimed Rs 100 crore (which could be revised upwards);

5. **September 9, 2015:** Bombay HC (Justice G.S. Patel) dismissed the Notice of Motion filed by NSE against the journal / website and its Editors;
6. **September 21, 2015:** In the NSE's appeal against Bombay HC's ruling against it regarding its defamation suit, the two-judge bench (consisting of Justices Kanade and Phansalkar-Joshi) of the Bombay HC stayed the penalty of Rs 50 lakh on the NSE.

Based on this background, this article is an analysis of the Bombay HC's judgment, wherein dismissed the Notice of Motion filed by NSE against the journal / website and its Editors and made some remarkable observations wherein Justice G.S. Patel appreciated the proactive role of media and the journalist, who assist the regulatory mechanism in detecting, reporting and also preventing frauds and scams in the securities market.

Analysis of the Bombay HC ruling:

One of the questions, apart from the technical aspects of the case, before Bombay HC was regarding the enormous time gap between receipt of anonymous letter (Jan. 2015) and publication of first article in Moneylife (June 2015). Bombay HC questioned what were the Editors doing till that time?

After detailed arguments and submissions, the Bombay HC observed that on June 11, 2015 (before publication of the article), Ms. Dalal (one of the Editors) emailed SEBI Chairman and NSE's senior personnel, but noted that there was no answer / reply. After few days, another reminder was sent but was met with silence. Later, Ms. Dalal sent an SMS to NSE's senior personnel, which also went in vain. Bombay HC noted that there were 3 distinct communications; however, there was not even a whisper of these communications in NSE's plaint. It stated that if NSE presumed that it is not bound to respond to any and every person who writes to it, HC noted Ms. Dalal's undoubted and well documented track record in financial matters,



and held that “She is a much-decorated and highly regarded journalist in financial sectors with nearly three decades of experience in the field. Her work and she have received recognition and are renowned..... It is to her credit that in April 1992, 23 years ago this year, it was she who was primarily responsible for exposing what came to be known as the Harshad Mehta scam, one that can, I think, safely be said to have directly led to the introduction of a series of regulatory measures and protective standards that govern, interestingly enough, the NSE itself. ... She had not gone to press with her article. She took the trouble firstly to make her own investigations, and then specifically to solicit the views of the two persons who manage and run the NSE. I do not believe she was duty-bound to do more.”

In NSE's plaint, Bombay HC noted that a very curious picture of NSE is attempted to be portrayed, wherein NSE plaint stated that it is incapable of making any mistake / wrongdoing, and the algorithmic trading are regulated by Circulars, based on recommendations of Technical Advisory Committees and that the RBI's financial stability report is sufficient control over NSE. HC held that “NSE expects respect. That is to be earned. It is not to be torn out of the throats of public the NSE is meant to serve. NSE is after all a public institution and it is in some sense or the other a custodian if not of public funds then at least of an undeniable public trust. This demands, the most complete transparency, accountability and openness in its actions, dealing and operations. It has no duty to respond to a wild or reckless allegation. But when a person, having made some enquiries, and herself having something of an established track record, makes a politely worded and pointed enquiry, not to respond to it seems to me either to be an example of the most egregious hubris and arrogance or, alternatively, an admission that there is an element of truth in what was being said.”

With respect to defamation and freedom of speech, the Bombay HC stated that “This is not

directly a question of freedom of press or free speech. At the same time I do not believe that a defamation action should be allowed to be used to negate or stifle genuine criticism, even pointed criticism or criticism that is harshly worded; nor should it be allowed to choke a fair warning to the public if its interest stands threatened in some way. It is to me a matter of very great dismay that the NSE should have attempted this action at all..... Every criticism is not defamation. Every person criticized is not defamed”

Bombay HC appreciated the role of journalists, editors, newspapers and television news anchors in investigating and reporting the scams / frauds. The HC rejected the media being termed as 'papparazzi', and however, it termed media as 'whistleblowers' and 'watchdogs' of the society which protects their interest. HC observed that “It is fashionable these days to deride every section of the media as mere papparazzi, chasing the salacious and steamy.... None of the scams and the leaks of the past two decades would have been possible without journalists, editors, newspapers and television news anchors. We have grown accustomed to mocking them. We deride their manner, describing them as loud, brash, obnoxious, abrasive and opinionated. We forget that but for them the many uncomfortable questions that must be asked of those in authority and those with the sheer muscle power of money would forever go unasked and unanswered. We forget that it is these persons we are so wont to mock who are, truly, the watchdogs of our body politic, the voice of our collective conscience, the sentinels on our ramparts. Watchdogs respond to whistles and whistles need whistleblowers”

With respect to efforts of Ms. Dalal, the Bombay HC rejected NSE's contention terming her as 'some out-of-control lone wolf', and observed that she is certainly entitled to ask, to question, to doubt and to draw legitimate conclusions.

The Bombay HC observed that all our institutions face the crisis of dwindling public confidence, for



which NSE and judiciary are no exception, and stated that the challenge is in finding legitimate methods of restoring that public trust and balance. The HC stated that NSE should be more transparent, accountable and open in its actions, dealing and operations, as it is a public institution.

Conclusion: Bombay HC dismissed application for

injunction in a defamation action (i.e. the notice of motion) filed against journal / website – www.moneylife.in and its Managing Editor and Executive Editor and imposed Rs. 50 lakh costs on NSE. Presently, the two-judge bench (consisting of Justices Kanade and Phansalkar-Joshi) of Bombay HC has stayed the penalty on NSE.



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